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SUPREME COURT, U. S.
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No. 69-5001

In the

Supreme Court of the United States

OCTOBER TERM, 1971

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Brief in Support of the

PETITION FOR REHEARING BY THE AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND THE ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT, AS AMICUS CURIAE

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Pursuant to Rule 58(1) of the Revised Rules of the Supreme Court of the United States, the American Civil Liberties Union, Illinois Division, and the Illinois Committee for the Abolition of Capital Punishment, as amicus curiae, respectfully petition for rehearing of the judgment and decision by the majority of this Court, dated June 29, 1972, and offer the following arguments in support of this Petition:

Rehearing Should be Granted on the Issues of Suppression of Evidence and Use of False Evidence

The decision of this Court applying the principles of *Brady* v. *Maryland*, 373 U.S. 830 and *Napue* v. *Illinois*, 360 U.S. 264, to the conviction of Lyman Moore stands in stark contrast to the application of those same principles to the facts presented in *Brady* and *Napue*, as well as *Miller* v. *Pate*, 386 U.S. 1; *Alcorta* v. *Texas*, 355 U.S. 28; *Pyle* v. *Kansas*, 317 U.S. 213; *Mooney* v. *Holohan*, 294 U.S. 103, and most recently in the case of *Giglio* v. *United States*, ... U.S. ..... The majority's disregard of the importance of the credibility of Virgle Sanders' testimony and the other evidence implicating "Slick" in the crime has lamentably restricted the salutary impact of its prior decisions upon full and fair presentation of the facts to the jury and has permitted a man to be convicted of a capital offense on the basis of deplorably dubious evidence.

The Court's decision in the present case turns upon neither the favorability of the evidence to the defense nor upon the issue of suppression of that evidence. Rather, the majority of this Court holds that the evidence in question "was not material to the issue of guilt" in light of the various identifications of Moore as the assailant and the man present at the Ponderosa Tap on April 27. In so doing, the majority seems to have considered only the evidence probative of guilt and to have drawn all inferences favorable to the Prosecution. This approach may be justified where the sufficiency of the evidence is questioned, but it cannot be deemed consistent with the standard applied where evidence has been withheld.

A finding of materiality of the evidence is required under *Brady, supra,* at 87. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." *Napue* v. *Illinois, supra,* at 271. *Giglio* v. *United States,* ..... U.S., ..., ...

Even setting aside the diagram which tended to contradict Powell's identification of Moore as the slayer, the evidence relating to "Slick" and particularly the pretrial statement of Virgle Sanders clearly weakened the Prosecution's case while simultaneously bolstering the plausibility of Moore's defenses. A jury might well have disbelieved Sanders' identification of Moore as the man with whom he spoke in the Ponderosa Tap. Since Sanders was the only one of the witnesses testifying about that occurrence who claimed to have had a prior acquaintance with "Slick," the identifications of the other witnesses could also have been shaken. Certainly, the impairment of Sanders' highly damaging testimony could reasonably have caused the jury to discount the value of the testimony of Fair and Boyce. This would seem particularly true when coupled with the other evidence regarding the identity of "Slick."

The majority seems entirely to have overlooked or dismissed the defects in the prosecution's evidence regarding the eye-witness identification by Patricia Hill and Henly Powell, as well as the uncontradicted and unimpeached alibi testimony offered by the headwaiter and the general manager of the club which employed Lyman Moore. This evidence was sufficiently persuasive to cause Justice Schaefer of the Illinois Supreme Court to conclude that there was insufficient evidence to support the conviction even apart from the evidence which was withheld. 42 Ill.2d at 85-86.

The majority's decision has deprived Petitioner Moore of the opportunity to present his full defense to an impartial jury. Permitting his conviction for murder to stand upon such hotly disputed facts perils not only the principles of fair disclosure but also the standards by which reversible error is determined. The majority's decision departs from this Court's past reluctance to resolve such factual disputes as its own and should be reconsidered.

The Court Should Grant Rehearing on the Admission of the Shotgun into Evidence as Proof of the Defendant's Guilt

The decisions of this Court upholding the admission of the 16-gauge shotgun into evidence against Petitioner Moore constitute a disturbing deviation from the principles of fair play upon which the Due Process Clause of the Constitution is predicated and should be withdrawn and reheard.

If the majority is correct that the "shotgun issue" was not properly presented in the state courts and was therefore not "properly presented for review," the appropriate disposition of that issue would be dismissal of certiorari on that question as improvidently granted. *Michel* v. *State of Louisiana,* 250 U.S. 91, 101-102; *Nelson* v. *Los Angeles County,* 362 U.S. 1, 9; *Wilson* v. *Cook,* 327 U.S. 474, 483-484. Having reached the question, however, this Court should have held that the admission of the shotgun into evidence against Petitioner Lyman Moore deprived him of his right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment.

By both ballistics tests and the State's pretrial stipulation, the 16-gauge shotgun admitted into evidence at Lyman Moore's trial was not, and could not have been, the murder weapon. In clear contradiction to these facts, the trial court admitted the weapon because of its apparent connection with commission of the murder, and the Illinois Supreme Court upheld the ruling because the shotgun was "suitable for the commission of the crime charged." 42 Ill.2d at 78, 246 N.E.2d at 302-303. Even before this Court, the State still confuses the issues by asserting the possibility that the 16-gauge shotgun was, in fact, the murder weapon (Respondent's Brief at 20-21), and that confusion is itself reflected in the majority's opinion:

> There is substantial other evidence in the record that a shotgun was used to kill Zitek, and that he suffered the wounds one would expect from a shotgun fired at close range. The testimony as to the murder itself, with all the details as to the shotgun wounds, is such that we cannot say that the presentation of the shotgun was so irrelevant or so inflammatory that Moore was denied a fair trial. U.S. at .....

The obvious inference from those facts is that the 16-gauge shotgun found in the constructive possession of Lyman Moore was, or could well have been, the murder weapon. The obvious inference from the confusion of the various courts considering the question is that the jury was, or could well have been, confused into thinking that the 16-gauge shotgun was, or could have been, the murder weapon. Principles of fairness and the administration of justice demand that this blatant inconsistency be remedied. Cf. *Miller* v. *Pate*, 386 U.S. 1.

The confusion and prejudice resulting from admission of the shotgun cannot be dissected from the Prosecution's use of that evidence during the course of trial. The Prosecution stressed the 16-gauge shotgun as proof of the dastardly character and homicidal predisposition of defendant Moore. This conduct was itself incompatible with accepted rules of evidence observed not only by this Court but by almost every court following the common law tradition, including Illinois. Cf. *Boyd* v. *United States,* 142 U.S. 450, 458; *Greer* v. *United States,* 245 U.S. 559; *Michelson* v. *United States,* 355 U.S. 469, 475-476; *Illinois* v. *Polenick,* 407 Ill. 337, 95 N.E.2d 414 (1951); *Illinois* v. *Stark,* 324 Ill. 289, 155 N.E. 271 (1927). See also, 1 Wigmore, *Evidence,* §§ 57, 193 (3d ed. 1940); 1 Wharton, *Criminal Evidence,* § 330 (11th ed. 1935).

It is no answer to this twofold error and double-prejudice that defense counsel at trial explained to the jury that the two weapons were not identical. Explanations by defense counsel could hardly be expected to correct the inflammatory and erroneous impression left in the wake of the confusion surrounding the shotgun and the prejudicial use made of that evidence by the State, both tacitly approved by the trial judge. Where, as here, elemental rules of fairness have been disregarded, not only by the Prosecution but by the very Courts of the State, Due Process cannot be satisfied by leaving the defense to its own devices.

CONCLUSION

For the reasons set forth above, the Court should withdraw its decision and grant rehearing in this case.

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